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No. 81-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

REAVER BLAKE, ET AL.,
Petitioners,

v.

PHIL PETERS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

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QUESTION PRESENTED

Where a case is conducted in accordance with the Constitution and federal statutes, it is resolved by a general jury verdict for the Defendants, and is affirmed per curiam without opinion by the Fifth Circuit Court of Appeals, should this Court grant a writ of certiorari?

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TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

PART ONE

STATEMENT OF THE CASE

The sixteen Petitioners filed on March 28, 1978, a civil rights lawsuit against seventeen present or former agents of the Georgia Bureau of Investigation.

(R. 4-7). [1] Five Defendants were never served, two Defendants were voluntarily dismissed during the trial, the judge granted a directed verdict against three Petitioners, and the jury rendered a Defendant's verdict as to the other thirteen Petitioners. (R. 21-25; T. 25, 152 M-O, 204-05, 258).[2]

The jury was presented with conflicting evidence as to what occurred at the Lowndes County Country Club (LCCC), Valdosta, Georgia on March 29-30, 1974.

1/ R. refers to Vol. I of the case, which contained the pleadings.

2/ T. refers to Vol. II of the case, which contained the trial transcript.

Respondents' evidence showed that in 1974 GBI Agents Gary Garner and Richard Hayes were investigating a bolita operation in Lowndes County, Georgia. (T. 282-83). Bolita is a two-digit lottery, and Agent Garner received information that the gambling operation was centered at the Lowndes County Country Club, which was owned by L. B. "Bossman" McFarland. (T. 283).

The information provided to the GBI was that the "dragmen" picked up the money and lottery work and brought it to the LCCC on Friday nights. (T. 187, 198-99, 285). No telephones were used by the gamblers; the dragmen would personally deliver the work and money to the LCCC. (T. 285). The winning number would be drawn from the container of ping pong balls numbered 0 to 99. (T. 285-86). On Friday night, March 22, 1974, Agent

Richard Hayes had observed fourteen or fifteen people come individually to the LCCC, meet L. B. McFarland in front of the building, go inside the LCCC for a few minutes and then leave. (T. 239).

At approximately 8:00 p.m., March 29, 1974, GBI Agents Phil Peters, Hayes and Garner obtained from a Superior Court judge in Moultrie, Georgia, a search warrant to search L. B. McFarland and any other person at the Lowndes County Country Club who could reasonably be involved in the concealment or destruction of gambling material. (T. 155, 184, 195, 225, 286-87; Defendants' Exhibit 40).

The gambling raid was executed about 11:30 p.m. that same evening. (T. 154, 225, 326, 332). Agent Carothers was the first agent to the LCCC (T. 289,

326). L. B. McFarland was on the front porch of the LCCC; Agent Mike Carothers identified himself as a GBI agent and told McFarland that Carothers had a search warrant. (T. 289, 326-27). Carothers took McFarland to McFarland's adjacent mobile home, and Agent Glynn Meeks and Carothers searched that dwelling. (T. 218, 327).

Agent Garner was the first officer into the LCCC and he shouted that he was a GBI agent and had a search warrant. (T. 290). He ordered the persons inside to put their hands on the bar. (T. 290). When the people inside did not respond, Garner again told them, "We have a search warrant. We are state police. Put your hands on the bar." (T. 290-91). He wanted to be certain that the people inside the LCCC knew he was a law enforcement officer. (T. 291).

In a small room of the LCCC, Agents Garner and Hayes arrested Petitioner Georgia Waters, who had six .38 caliber bullets in his pocket. The room was full of adding machines, ledger-type records, adding machine tapes, bundles of paper with numbers on them, boxes of currency, cans of coins, and a round bingo type wire cage with balls in it. (T. 296, 333). Garner realized that he was in the "office" of a very large lottery operation. (T. 297).

In the main room of the LCCC were two electric slot machines and a glass bowl with numbered ping pong balls in it. (T. 230, 297). As the various law enforcement officers began to secure the club, they found a considerable number of firearms. (T. 298). Twenty-three firearms were seized and later turned over to the Federal Bureau of Alcohol, Tax, and Firearms. (T. 329; Defendants' Exhibit 43).

The persons already at the LCCC were searched, and as persons came onto the property of the LCCC they were searched. (T. 251, 256, 258, 298, 304-05). The women were searched by female GBI agents outside the presence of any male. (T. 73, 94-95, 108, 116, 179, 248). If a person had money with lottery work, the money and lottery workwere seized and the person arrested. (T. 185-86, 252-53, 299, 305). If no evidence of lottery was seized, the person was allowed to leave. (T. 191).

The GBI agents denied threatening anyone, using racial slurs, or telling anyone that a holdup was taking place. (T. 156, 231-32, 304, 327, 333-34). Garner testified he pointed his rifle only at Waters because he thought Waters had a pistol. (T. 292). The agents testified they identified themselves. (T. 289-90,

326-27, 332). The other Respondents never took their weapons out of their holsters. (T. 157, 227, 250-52, 333).

That night the GBI seized $368,559.33 in cash. (T. 159). Of that amount, $364,311.88 was seized from McFarland and $4,247.45 was seized from the sixteen Petitioners. (T. 159). Both the United States Bureau of Internal Revenue and the Georgia Department of Revenue placed levies on the money. (T. 118C, 160). The GBI turned over $9,022.00 to the Georgia Department of Revenue and $354,769.88 to the Internal Revenue Service. 3/ (T. 118C-E, 160). The

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3/ McFarland's lawsuit against the Commissioner of the Internal Revenue for a return of this money was dismissed for lack of jurisdiction. See McFarland v. Henderson, C76-1656A (N.D. Ga. Jan. 6, 1978).

$4,247.45 seized from the sixteen Petitioners was placed in the GBI evidence vault. (T. 160).

McFarland was convicted of keeping a gambling place and his conviction was affirmed on direct appeal. (Defendants' Exhibit 4). McFarland v. State, 137 Ga. App. 354, 223 S.E.2d 739 (1976), cert. denied, 429 U.S. 831 (1976). Criminal charges were placed against the sixteen Petitioners, and the Lowndes County Solicitor told Garner that when the McFarland appeal was final, the Solicitor would make arrangements on the other cases. (T. 308). The Solicitor said to Garner, "When I need you, I'll call you." (T. 309). However, without ever consulting with or advising the GBI, the Solicitor on April 17, 1978, nolle prosequi the pending gambling cases against Petitioners.

(T. 161; Defendants' Exhibits 2, 4, 6, 12, 14, 15, 17, 19, 21, 24, 26, 28, 31, 33, 35, 37).

REASONS FOR NOT GRANTING THE WRIT

SINCE THIS CASE INVOLVED A GENERAL VERDICT AND A PER CURIAM AFFIRMANCE BY THE FIFTH CIRCUIT COURT OF APPEALS, THERE IS NO ISSUED OPINION FOR THIS COURT TO REVIEW; MOREOVER, THE TRIAL WAS CONDUCTED IN ACCORDANCE WITH THE CONSTITUTION AND FEDERAL STATUTES.

At trial only two pieces of evidence seized from Petitioners were admitted. A lottery slip seized from Petitioner Robert Davis (Defendants' Exhibit 23) was admitted into evidence without objection. (T. 301). Therefore, Petitioners have waived their right to raise this issue to a higher court. See Skogen v. Dow Chemical Co., 375 F.2d 692, 703

(8th Cir. 1967).

In their direct testimony 3 Petitioners, including Carlton Wyche, stated that papers with numbers on them had been seized from them by the GBI. (T. 89, 109V, 118I). On cross-examination the lottery slips seized from Petitioner Wyche were introduced into evidence. (Defendants' Exhibit 30). The lottery slips were relevant to Wyche's direct testimony, and the Federal Rules of Evidence favor the admission of relevant evidence. F.R.Evid. 402.

Moreover, Petitioners abandoned their challenge to the validity of the search warrant. The trial judge charged that the search warrant was lawful (T. 366), and Petitioners made no objection to the charge.

Petitioners filed their lawsuit pursuant to 42 U.S.C. § 1983. As law enforcement officers Respondents had a qualified immunity, and a reasonable good faith belief in the validity of the search warrant was a valid defense. See, e.g., Turner v. Raynes, 611 F.2d 92 (5th Cir. 1980). The trial judge appropriately admitted all relevant evidence so the jury could decide the issue of good faith.

The trend in recent federal decisions is the narrowing, rather than the broadening of the exclusionary rule. The exclusionary rule is not applicable to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The exclusionary rule has never been interpreted to proscribe the use of alleged illegally seized evidence in all proceedings

or against all persons. Id. at 347-48. The fundamental purpose of the exclusionary rule is to prohibit the introduction of illegally seized evidence from the accused at the criminal trial of the accused. See United States v. Janis, 428 U.S. 433 (1976).

In their complaint Petitioners alleged that Respondents had converted the $4,247.45 seized from Petitioners. (R. 5). To prove conversion Petitioners had to prove two elements: (1) Respondents had the money, and (2) Petitioners had a right to possess the money. McDaniel v. White, 140 Ga. App. 118, 230 S.E.2d 500 (1976). It was essential that Petitioners prove they had a right to possession, for merely proving the GBI had no right to keep the money did not prove conversion. Warshaw v. Eastman

Kodak Co., 148 Ga. App. 670, 252 S.E.2d 182 (1979). Under Georgia law Respondents had a defense that Petitioners had no right to possess contraband. Id.; see Blackmon v. Brotherhood Protective Order of Elks, Toccoa Lodge No. 1820, 232 Ga. 671, 208 S.E.2d 483 (1974).

It was undisputed that money seized from Petitioners was in the evidence vault of the GBI; however, there was a disputed issue of fact as to whether Petitioners had a right to possess the money. Under Georgia law funds used for purposes of gambling and seized in any gambling place are contraband, shall vest in the county, and shall be paid into the county treasury as county funds. Ga. Code Ann. § 26-2709; see generally Metropolitan Dade County v. United States, 635 F.2d 512 (5th Cir. 1981).

It was undisputed that the LCCC was a gambling place. The evidence of Respondents showed that Petitioners were the "dragmen" who picked up the money and lottery work from the "writers" and delivered these items to the LCCC. Petitioners' money was used for the purpose of gambling and seized in a gambling place; therefore, it was contraband. Petitioners had no right to possess contraband, and Respondents were not guilty of conversion.

Because of the conflict in the evidence as to whether or not the Petitioners' money was contraband, the issue went to the jury. Obviously, finding the evidence of the GBI to be credible, the jury brought back a Defendants' verdict.

Since this was a general jury verdict, the District Court merely entered

judgment on its directed verdict for the Defendants and the jury verdict. (Respondents' Appendix, pp. 1-4). Petitioners James Lee, Marie Walker, and Sammy Branch did not appeal the directed verdict. The remaining Petitioners appealed the jury verdict. (Respondents' Appendix, p. 3).

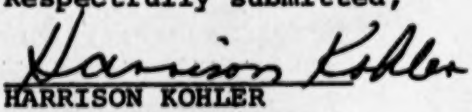
In a per curiam affirmance without opinion, the Fifth Circuit upheld the jury verdict. (Petitioners' Appendix).

What Petitioners are asking this Court to do is review an affirmance of a Court of Appeals where no written opinion was ever issued. Clearly, this case is not the kind of case where a writ of certiorari should be granted. See Rule 17, United States Supreme Court.

CONCLUSION

The petition for writ of certiorari should be denied because no sufficient reasons for review have been set forth by Petitioners.

Respectfully submitted,



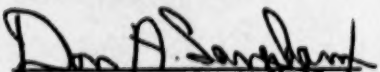
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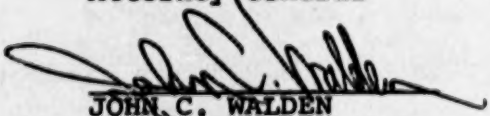
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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for the Respondents, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the Rules of the Supreme Court, I have this day served three true and correct copies of this Brief for the Respondents in Opposition upon the Petitioners, by depositing three copies of this Brief in the United States Mail, with adequate postage and addressed to:

Mr. Herbert Shafer
Attorney at Law
432 Delmont Drive, N.E.
Atlanta, Georgia 30305

Mr. James K. O'Malley
Attorney at Law
205 Ross Street
Pittsburgh, Pennsylvania
15219

This 29th day of July, 1981.

Harrison Kohler

HARRISON KOHLER
Assistant Attorney
General

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REAVER BLAKE, ET AL.,	*	
	*	
Plaintiffs,	*	CIVIL ACTION FILE
	*	NO. C78-540A
v.	*	
	*	JUDGMENT
PHIL PETERS, ET AL.,	*	
	*	
Defendants.	*	

This action came on for trial by jury and the Court, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, the court granting defendants' motion for directed verdict as to James Lee, Marie Walker, and Sammy Branch.

It is Ordered and Adjudged that the plaintiffs, James Lee, Marie Walker, and Sammy Branch, take nothing, that the action be dismissed and that defendants,

Phil Peters, Gary M. Garner, J. Richard Hayes, J. R. Longino, Clyde Heard, Tim Jones, B. B. Tharpe, Mike L. Carothers, Glenn Meeks, and T. R. Bentley recover of the plaintiffs, their costs of Action.

Dated at Atlanta, Georgia , this 21st day of March, 1980

Filed and entered
in the Clerk's Office:
March 21, 1980
BEN H. CARTER, CLERK

By: Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REAVER BLAKE, ET AL.,	*	
	*	
Plaintiffs,	*	CIVIL ACTION FILE
	*	NO. C78-540A
v.	*	
	*	JUDGMENT
PHIL PETERS, ET AL.,	*	
	*	
Defendants.	*	

This action came on for trial before the Court and a jury, Honorable Richard C. Freeman, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiffs, REAVER BLAKE, MARY A. DELAUGHTER, FREDERICK LEE BELL, ARTHUR MCCONNEHEAD, JR., EDDIE B. TUCKER, CARLTON WYCHE, P. J. BURNS, ROBERT E. DAVIS, SAMUEL THOMAS, BEN WILSON, E. S.

JOHNSON, SR., MAMIE LOU LARKIN, and GEORGE WATERS, take nothing, that the action be dismissed and that the defendants, PHIL PETERS, GARY M. GARNER, J. RICHARD HAYES, J. R. LONGINO, CLYDE HEARD, TIM JONES, B. B. THARPE, MIKE L. CAROTHERS, GLENN MEEKS, and T. R. BENTLEY, recover of the plaintiffs their costs of Action.

Dated at Atlanta, Georgia, this 21st day of March, 1980.

Filed and entered in
the Clerk's Office:
March 21, 1980
BEN H. CARTER, CLERK

By: Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

REAVER BLAKE, ET AL.,	*	
	*	
Plaintiffs,	*	CIVIL ACTION NO.
	*	C-78-540A
v.	*	
	*	
PHIL PETERS, ET AL.,	*	
	*	
Defendants.	*	

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs herein hereby appeal to the United States Court of Appeals for the Fifth Circuit from the jury's verdict and the final judgment entered thereon in favor of the defendants and against the plaintiffs.

Respectfully submitted,

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Filed in Clerk's Office April 14, 1980.